No. 356

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

JAMES W. ANDREWS, as Trustee in Bankruptcy of the Estate of FRANK SHANNON, Bankrupt,

PETITIONER,

against

THE METROPOLITAN JOCKEY CLUB and WALTER KEENAN and CENTRAL HANOVER BANK AND TRUST COMPANY, sole executors of the Estate of John G. Cavanagh, Deceased,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NASSAU, AND BRIEF IN SUPPORT THEREOF

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PETITION:

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To THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

James W. Andrews, as Trustee in bankruptcy of Frank Shannon, Bankrupt, prays that a writ of certiorari issue to review the judgment on remittitur on the Order of the Court of Appeals of the State of New York, entered herein in the Supreme Court of the State of New York, County of Nassau, on the 13th day of May, 1942, which affirmed the judgment of the

said Supreme Court of the State of New York, County of Nassau, which dismissed petitioner's complaint (R. 45) in an action for money had and received to the use of the plaintiff's bankrupt (R. 7); and such order of the Court of Appeals (R., pp. b, c).

The said Court of Appeals entertained a motion for rehearing of the appeal and filed its order denying such motion on June 4, 1942 (R., p. d).

THE FACTS.

The facts are not in dispute.

The plaintiff is the trustee in bankruptcy of Frank Shannon, a race-track bookmaker who filed a voluntary petition in bankruptcy in the United States District Court for the Eastern District of New York after a judgment had been secured against him for the recovery of stolen moneys lost to him by the thief in bets on horse races at race tracks in New York State.

Bookmaking is prohibited by Article I, § 9 of the New York Constitution.

The respondent, Metropolitan Jockey Club, is the operator of a horse-race track at Jamaica, Long Island, New York, known as the Jamaica Track (R. 122, 126).

John G. Cavanagh was the agent of the Club to make the daily collections from bookmakers hereinafter described (R. 24, 124) and was originally sued jointly with the Club.

The defendant, Cavanagh, died after the suit had been brought, and the respondents, Walter Keenan and Central Hanover Bank & Trust Company, as the sole executors under his will, were substituted as parties defendant (R. 1).

In the years 1934, 1935, and 1936, Frank Shannon, while operating as a bookmaker at the said Jamaica Track, paid to the respondent Club *in cash* $100 a day for every day upon which six races were run there, and $110 a day on each day upon which seven races were run (R. 252).

He also paid in cash $25 a day for five tickets at $5 each for the admission of his clerks to the Club House betting ring at the track (R. 252). This was a higher charge than that for admission to other portions of the race track grounds (R. 125, 160). This state of facts formed the basis of a claim for recovery of these sums by the petitioner upon the ground that the Crawford Law (New York Laws, 1934, chap. 233) was unconstitutional in that it removed all criminal penalties for bookmaking at race tracks; but this question was not reached for decision because of the disposition by the court of the preliminary question of ownership of Shannon's winnings which raises the constitutional questions which are the subject of this petition.

It is conceded that during this period Shannon was insolvent (R. 176, 252). There was no evidence that he received any consideration for these payments (R. 139). The respondents claimed that these payments were "donations" to the respondent Club as contributions for stakes and purses (R. 252).

These gifts were made daily, one day in advance, for the races to be held the following day (R. 67). It was the practice at this track for the Club to refund to a bookmaker his "donation" if he was unable to operate at the track upon the day for which it was made (R. 124, 133, 135, 158).

Counsel for the respondent Club admitted upon the trial that his client knew that Shannon and other bookmakers who made like donations, were making book at its track in 1934, 1935, and 1936, and accepting bets and paying losses (R. 56); that these acts were illegal and that it made no effort to stop them. In 1935 and 1936 alone the Club collected $410,983 as such donations from the bookmakers at its track (R. 29, 30, 32).

The Trustee in bankruptcy brought suit for the benefit of creditors to recover these daily donations because they were obtained from Shannon (1) while he was insolvent and (2) through undue influence (R. 11).

Among the claims filed in the bankruptcy action was one by the Collector of Internal Revenue for $1,216.86 as unpaid Federal income taxes (R. 104); and one for $22,895.76, the amount of a judgment (mentioned, *supra,* p. 2), obtained by the Receiver in Supplementary Proceedings of one Toale for money stolen by him and lost to Shannon on horse-race bets (R. 22). (*Marett, Rec'r* v. *Shannon,* 164 Misc. 790—opinion printed Appendix A, *post,* p. 24).

The respondents, under a general denial (R. 8) claimed that the money sought to be recovered belonged to persons who advanced money to finance Shannon and at the trial offered in evidence—over petitioner's objection—a deposition of one McClanahan (R. 212), an ex-gambling-house keeper, to the effect that in April, 1936, he had advanced $30,000 to Shannon toward his "bankroll" or gambling capital (which totalled $35,000—[R. 153]) for Shannon's "book" to commence the 1936 season, under an oral agreement that all of Shannon's winnings were to become the property of McClanahan, his financier. Remittance was made by checks, payable to Shannon's order

(R. 168, 246, 247) and were endorsed and deposited in a joint account in the name of Shannon's wife and his cashier (R. 153).

Early in October, 1936, Shannon had refunded the $30,000 to McClanahan and continued to operate for the rest of the racing season which ended about three weeks later (R. 49, 50, 55). There was no evidence that the balance in the bankroll—which included daily winnings (R. 67, 73, 74, 153)—ever fell below $30,000 during the season. The alleged financiers for the 1934 and 1935 seasons did not testify.

The plaintiff objected to the introduction of all evidence of this alleged contract between McClanahan and Shannon (R. 212) upon the ground that, even if proved, it was illegal and, under the decision in the case of *Chapin* v. *Austin,* 165 Misc. 414 (opinion printed as Appendix B, *post,* p. 27) applying § 993 of the Penal Law, it was void and incompetent to rebut the presumption of law that the currency which Shannon paid over to the respondent Club belonged to Shannon because it was in his possession.

The petitioner's objection was overruled, the evidence was admitted and the complaint was dismissed by the Trial Court upon the ground that (R. 254):

> "It would be a miscarriage of justice to allow creditors of a bankrupt to recover money never owned by that bankrupt through a technical claim that evidence may not be presented to show that he did not own the money because he used it in connection with an illegal business, viz.: bookmaking. The claim of illegality should not be permitted as a cloak for injustice."

McClanahan had received back all the money he advanced to Shannon. The cash paid to the respondent

Club by Shannon represented his winnings or, in part, the other $5,000 he had in his bankroll. The admissibility of evidence offered in an attempt to prove that McClanahan owned any of the money presented the basic question of law upon the record. This question all the lower Courts have failed to discuss.

The nub of the law as to McClanahan's advance was not that Shannon *used* it in connection with bookmaking but that it was *advanced to him to use* in bookmaking (see § 993, Penal Law, quoted in brief in full, *post,* pp. 16, 17).

The petitioner in making his objection relied upon § 993 of the Penal Law of the State of New York which was applied in the case of *Chapin* v. *Austin, supra,* (Appendix B, *post*).

Neither appellate court filed any opinion herein.

Four other identical actions by this petitioner against four other racing associations are awaiting the disposition of this case.

QUESTIONS PRESENTED.

1. Whether the creditors of this bankrupt through the petitioner have been deprived of the protection of the law of the land in that the Courts have ignored and failed to apply § 993 of the Penal Law of the State of New York which provides:

> "*All things in action,* judgments, mortgages, conveyances, and every other security whatsoever, *given or executed,* by any person, where the whole or any part of the consideration of the same shall be for any money or other valuable thing won by playing at any game whatsoever, or won by betting on the hands or sides of such

> as do play at any game, or *where the same shall be made for the repaying* any money knowingly lent or *advanced* for the *purpose of such gaming or betting* aforesaid, or lent or advanced at the time and place of such play, to any person so gaming or betting aforesaid, or to any person who during such play, shall play or bet, *shall be utterly void,* * * *." (Italics ours.) (The remainder of the statute is quoted *post,* p. 16.)

and thereby discriminated unjustifiably in favor of those engaged in violating the gambling laws of the State and against the petitioner in violation of the rights of the bankrupt's creditors and of the petitioner under the Fourteenth Amendment to the Federal Constitution.

2. Whether evidence of a void (e. g., gambling) contract is admissible—except by statute—to rebut the legal presumption that the possessor of currency is the owner thereof.

3. Whether a court may give legal effect to a void contract, e. g.: whereby the winnings of a common gambler would become the property of one who has supplied some funds for his gambling enterprise.

4. Whether the rights of legitimate business should not prevail over the interests of an organized gambling industry when they clash in the courts of a State whose constitution, laws, decisions, and public policy are all directed to the suppression of common gambling. (*Watts* v. *Malatesta,* 262 N. Y. 80; *Bamman* v. *Erickson,* 288 N. Y. 133.)

PROCEEDINGS IN THE STATE COURTS.

The petitioner as Trustee in Bankruptcy in September, 1937, brought this action at law in the Supreme

Court of the State of New York, Nassau County, to recover $13,500 on a simple complaint for money had and received to the use of his bankrupt.

A bill of particulars was demanded (R. 9) and filed (R. 11).

A motion to dismiss the complaint on the ground that it did not state a cause of action was granted (170 Misc. [N. Y.] 338) upon the theory that Shannon was *in pari delicto* with the respondent Club; but, on appeal by the petitioner, the Appellate Division, Second Department, reversed (258 App. Div. 1086) and denied the motion.

The action was tried to the Court (HOOLEY, *J.*), without a jury and the complaint was dismissed with an opinion which is unreported. It is printed at page 252 of the Record.

On appeal by the petitioner to the Appellate Division, Second Department, the judgment was affirmed without opinion (262 App. Div. 752).

The petitioner then appealed to the Court of Appeals, by permission, and the Court of Appeals affirmed the judgment, without opinion (288 N. Y. 57 [memo.]).

The petitioner moved for re-argument of the appeal in the Court of Appeals and the motion was denied, without opinion (288 N. Y. 197 [memo.]).

REASONS FOR GRANTING THE WRIT.

The decision of this case involves an important basic principle, ignored by the state courts (*Armour & Co.* v. *Ft. Morgan S. S. Co.*, 270 U. S. 253, 257), the application of which is of wide public and govern-

mental interest, and which should be authoritatively applied by this Court of final jurisdiction. Aside from the well recognized immoral aspect of commercialized gambling, its economic inroads are of such importance that a national policy to deal with it should be announced by this Court, especially at this time when the tendency to extravagance and gambling threatens to undermine the national economy.

The subject of organized race-track gambling in any aspect has never been dealt with by this Court as far as the reports disclose. The industry is gigantic, involving the transfer of billions of dollars a year, and adversely affects the economic stability of communities throughout the country which should be shielded and supported to the limit of the law.

The principle is this: that the gambling industry should bear the economic burden of absorbing the losses that naturally flow from and are incident to its own operations.

To that end, anti-gambling laws should be broadly construed and rigidly applied with the body of the general law to accomplish their intended purpose—to discourage, control, suppress and, as far as possible, extirpate commercialized gambling from the life of the nation for the protection and advancement of legitimate business and the moral health of the community.

In this case the state courts have ignored that principle; with the result that the petitioner has thereby been deprived of the protection of the law of the land and has been unjustifiably discriminated against in favor of a commercialized gambling organization actively and openly engaged in violating for selfish purposes the anti-gambling provision of the state consti-

tution and the public policy of the State; all in violation of the rights guaranteed to the petitioner and the creditors he represents by the Fourteenth Amendment to the Federal Constitution.

One of the economic evils of commercialized gambling is its unnatural incitement to crime. In this case the most substantial claim (*Marett, Receiver*) is based upon the theft of a large amount of money from a bank to satisfy in the thief the very gambling vice this respondent Club fostered and promoted on its premises by allowing bookmakers there to operate openly a business it had the statutory power to prevent.

If such thievery becomes so rampant that the profits of the gambling industry are insufficient to absorb the losses that must otherwise be borne by legitimate business, it would be manifestly unjust to permit that illegal industry to lead a charmed existence outside the law and continue to siphon off the economic life-blood of the community. If one of the two must suffer, the legitimate, productive elements of society should not be denied the full protection that the laws afford.

The Constitution, statutes, decisions and public policy of the State of New York all combine to afford such protection; but when this petitioner who represents this legitimate business victim of this illegitimate industry comes forth empty-handed from the state courts upon an admitted Record of law violation by the respondents, and an undisputed state of facts supporting his proposition of law, he has been denied the protection of the law of the land.

The State courts have by their decision established a dangerous precedent for the proposition that illegal and void contracts between common gamblers for the

promotion of gambling, may be given effect to defeat the rights of creditors in legitimate business and claims for overdue Federal taxes.

Likewise the State courts have, in this case established a precedent which will promote fraud and collusion among common gamblers to defeat the state laws permitting the recovery of lost bets from common gamblers as a means of discouraging violations of the anti-gambling laws and of protecting robbed business institutions from loss; since under this decision a gambler may make a judgment against him of no effect by entering into a secret oral contract with one who ostensibly finances him with only a small portion of his capital.

Gambling today is not merely a matter of an occasional bet between friends; it relates to the operation of great gambling promotion enterprises which employ every resource of craft and money in order to swell their profits by spreading the gambling habit and breaking down the legal safeguards against it. Organized gambling not only harms the individual and leaves a trail of bribery, corruption, ruined homes and human degradation, but it is a scourge upon the national economic life. It discourages constructive work through a blind method of distributing wealth; it is wholly unproductive to society with an enormous waste of time, energy and money; it furnishes a temptation to divert funds from normal economic channels and despoils legitimate business, and develops a type of immorality that is dangerous to the State as well as to the individual.

Commercialized race-track gambling is the greatest evil threatening the noble sport of horse racing, for

interest in the sport itself is lessened in proportion to the gambling introduced. It is universal experience that when gambling is permitted to enter into any sport, that sport is ruined—witness the decline of professional baseball when professional gamblers attempted to control it.

In the words of ex-Attorney General Charles J. Bonaparte, who testified before a Legislative Committee in Washington in 1917:

> "According to my observations, the gambling in connection with horse-racing is not only a source of great demoralization and consequent unhappiness, crime and misery throughout the country, but it has virtually destroyed the value and utility of racing, whether as a legitimate form of sport or as a means of improving the breed of horses."

ASSIGNMENTS OF ERROR.

The errors which petitioner urges as ground for granting the writ of certiorari and for reversing the judgment of the State Court, are:

1. In that it neglected to enforce herein the applicable anti-gambling laws of the State of New York, particularly § 993 of the Penal Law.

2. In that it admitted, over petitioner's objection, evidence of a gambling contract creating a *chose in action* declared void by statute to rebut the legal presumption that the possessor of currency is the owner thereof.

3. In that it gave effect to a void gambling contract to defeat the petitioner's cause of action.

4. In that it dismissed the petitioner's complaint.

WHEREFORE, it is respectfully submitted that this petition should be granted.

JAMES W. ANDREWS,
As Trustee in Bankruptcy of
the Estate of Frank Shannon,
Bankrupt.

HORACE M. GRAY,
CHARLES E. WYTHE,
Counsel for Petitioner.

I hereby certify that I have examined the foregoing petition, that in my opinion it is well founded and entitled to the favorable consideration of this Court and that it is not filed for the purpose of delay.

HORACE M. GRAY,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION.

I.

OPINION BELOW.

The opinion filed in the Trial Court appears at page 252 of the Record and is not reported. No appellate court filed any opinion.

II.

JURISDICTION.

The judgment on remittitur from the Court of Appeals was entered in the Supreme Court, Nassau County, on May 13, 1942 (R., p. g). Petition for rehearing was entertained by the Court of Appeals and denied June 4, 1942 (R., p. d). Jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code as amended (28 U. S. C., § 344).

III.

SPECIFICATION OF ERRORS TO BE URGED.

All of the errors set forth in the Assignments of Error (Petition, p. 12) will be urged.

IV.

FACTS.

The facts are stated in the Petition (*ante*, pp. 2-6) to which reference is made.

ARGUMENT.

I.

SHANNON HAD PRIMA FACIE TITLE TO THE MONEY PAID TO THE RESPONDENTS AS A MATTER OF LAW.

Possession of currency denotes ownership thereof in the possessor by presumption of law.

Collins v. *Gilbert*, 94 U. S. 753, 760;
Goshen Nat'l Bank v. *Bingham*, 118 N. Y. 349, 355;

Barlow v. *Myers,* 24 Hun (N. Y.) 286, 289;
Spraights v. *Hawley,* 39 N. Y. 441, 446;
Whiton v. *Snyder,* 88 N. Y. 299, 302;
Perkins v. *Guaranty Trust Co.,* 274 N. Y. 250, 261.

Shannon had possession and control of his bankroll.

The Trial Court held (R. 252): "* * * Shannon paid to John Cavanagh, etc."

The advance from McClanahan was made by three checks payable to the order of Frank Shannon (R. 168, 246, 247).

The checks were endorsed by Shannon (R. 246, 247) and deposited in a joint account in the names of Virginia Shannon, his wife (R. 153) and Walter Faust, his cashier.

His winnings in his cashier's hands at the track resulting from his own operations as a bookmaker were used to make the payments sued for (R. 67, 74). Surplus winnings were deposited in the joint bank account (R. 153).

THE PETITIONER HAS BEEN DENIED THE PROTECTION OF THE ANTI-GAMBLING LAWS.

During the period involved in this suit the Constitution of the State of New York provided in Article I, § 9:

> "9. * * *; nor shall any lottery or the sale of lottery tickets, pool-selling, bookmaking, or any other kind of gambling hereafter be authorized or allowed within this state; and the legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section."

It was also provided by § 991 of the Penal Law of the State:

> "All wagers, bets or stakes, made to depend upon any race, or upon any gaming by lot or chance, or upon any lot, chance, casualty, or unknown or contingent event whatever, shall be unlawful."

and by § 992 of the Penal Law:

> "All contracts for or on account of any money or property, or thing in action wagered, bet or staked, as provided in the preceding section, shall be void."

It was provided by § 993 of the Penal Law:

> "All things in action, judgments, mortgages, conveyances, and every other security whatsoever, given or executed, by any person, where the whole or any part of the consideration of the same shall be for any money or other valuable thing won by playing at any game whatsoever, or won by betting on the hands or sides of such as do play at any game, or where the same shall be made for the purpose of such gaming or betting aforesaid, or lent or advanced at the time and place of such play, to any person so gaming or betting aforesaid, or to any person who during such play, shall play or bet, shall be utterly void, except where such securities, conveyances or mortgages shall affect any real estate, when the same shall be void as to the grantee therein, so far only as hereinafter declared.
>
> When any securities, mortgages or other conveyances, executed for the whole or part of any consideration specified in the preceding paragraph shall affect any real estate, they shall inure for the sole benefit of such person as would be entitled to the said real estate, if the grantor or person incumbering the same, had died, immediately upon the execution of such instrument,

> and shall be deemed to be taken and held to and for the use of the person who would be so entitled. All grants, covenants and conveyances, for preventing such real estate from coming to, or devolving upon, the person hereby intended to enjoy the same as aforesaid, or in any way incumbering or charging the same, so as to prevent such person from enjoying the same fully and entirely, shall be deemed fraudulent and void."

The bankrolling contract between Shannon and his financier created a "thing in action."

> *Bushnell* v. *Kennedy,* 76 U. S. 387, 392;
> *Blodgett* v. *Silberman,* 277 U. S. 1, 9, 10;
> *Castle* v. *Castle* (C. C. A. 9), 267 Fed. 521, 523;
> *Nudelman* v. *Insulite Co.* (1937), 252 App. Div. (N. Y.) 642, 644.

The terms of § 993 are broad and cover intangibles as well as tangibles.

That same section was construed to render void a note given by a borrower who advanced the borrowed money to "bankroll" a bookmaker in *Chapin* v. *Austin,* 165 Misc. 414 (printed as Appendix B, *post*).

This statute is a valid law of the land and as such must be enforced. Failure to enforce it has deprived the petitioner of a just recovery.

In its opinion (R. 252), the Trial Court said:

> "The plaintiff leans heavily upon the case of *Chapin* v. *Austin,* 165 Misc. 414, decided by this Court,"

and then held the case was not in point but said nothing about § 993, Penal Law, which was the basis of the decision.

The general law of the land also renders an illegal contract ineffective against legal rights.

> *Armstrong* v. *Toler,* 11 Wheat. (24 U. S.) 258.

That which is void for reasons of public policy cannot be made valid by indirection and the respondents be thus permitted to make out a defense with the affirmative aid of a void contract.

The Court of Appeals of New York stated the law in *Sabine* v. *Paine,* 223 N. Y. 401, at page 404:

> "An instrument which a statute, expressly or through necessary implication, declares void. strictly speaking, is a *simulacrum* only. It is without legal efficacy. It cannot obligate a party or support a right."

A *chose in action* can rank no higher than the evidence adduced to support it. Oral evidence of an obligation under a void contract does not rank higher than a written instrument as evidence thereof.

Any contract or *chose in action* declared by statute to be "utterly void" must be treated by the Courts as being non-existent in fact and any evidence to the contrary is incompetent to establish it. Otherwise the express provisions of the statute are ignored.

The basis of the decision of the Trial Court was ownership of the money in another. The only evidence offered to support the finding is of a contract which the Penal Law of the State of New York declares is null and void.

Without such evidence there would have been nothing in the Record to support the Court's decision.

The respondent Club is not entitled to have an exception made in its favor. It concedes that it allowed bookmaking to flourish at its track in 1934, 1935 and 1936. Counsel for the Club conceded (R. 56):

> "Mr. Carr: I will concede we knew during 1934 and 1935 and 1936 that Frank Shannon was at the track on certain days offering to accept wagers from the public, accepting them, recording them on the sheet, and in the event that the bettor who made the bet with him won, at the odds Frank Shannon offered, he would then pay the bettor off in cash.
>
> The Court: That was done with the knowledge of the defendant?
>
> Mr. Carr: That was done with the knowledge of the defendant."

and further (R. 195):

> "The Court: * * * bets were being made down there, wagers were being placed with bookmakers; that that was done openly; that the racing association knew it; that it was illegal; that nothing was done to stop it; in other words, what happened here is the racing association relied on the statute which apparently they believed made the only penalty for the recovery of money wagered in a civil action. Have I stated it correctly?
>
> Mr. Carr: You have stated it correctly."

The respondent Club had the statutory power to prevent bookmaking at its track. Since 1926 all Racing Associations had the power (Laws 1926, Chap. 440; Unconsolidated Laws, § 1134) to appoint

> "* * * five or more special policemen * * * who * * * shall be police officers * * * whose duty * * * shall be to preserve order * * * and * * * to prevent all violations of law with reference to * * * bookmaking * * * and to arrest any and all persons violating such provisions * * *."

The respondent Club *did not exercise* that appointive power (R. 98, 99).

It thus deliberately violated the spirit and letter of the Constitution and was directly responsible for the conditions (R. 167) which induced the illegal financing contract (R. 183) upon which it relies to defeat this action.

The clear purpose of the laws to carry out the public policy to protect society against organized gambling has been frustrated and the protection intended to be afforded this petitioner has been unjustifiably withheld.

THE OPINION BELOW IGNORED THE REAL ISSUE OF LAW PRESENTED IN THIS CASE.

The opinion filed in this action is that of the Trial Court. It is not officially reported but is printed at pages 252-255 of the Record.

The Appellate Division and the Court of Appeals both concurred without further opinion.

The opinion finds (R. 252) that:

> "Shannon paid to John Cavanagh, as agent of the defendant club, the sum of $100 as contribution to stakes and purses, for each day that six races were run at the track, and $110 for each day that seven races were run, during the seasons of 1934, 1935 and 1936. During that entire period Shannon was insolvent."

Consideration of the questions involved in this case must be based upon two established facts:

1—Shannon possessed the currency paid as contributions.

2—Shannon was insolvent when he made the payments.

With no other controlling facts, the contributions would be recoverable for Shannon's creditors under § 273 of the Debtor and Creditor Law which provides:

> "Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration."

The Court then proceeds to deny recovery upon the findings that Shannon did not own the currency (R. 253) but that it belonged to his "bankroller" McClanahan.

The finding that Shannon did not own the money could not have been made without receiving, over petitioner's objection evidence of the alleged oral "bankrolling" contract (R. 212).

Such contracts are declared to be void under § 993 of the Penal Law (*ante*, p. 16).

> *Chapin* v. *Austin*, 165 Misc. 414 (Appendix B, *post*, p. 27).

The "bank-roller" could not have recovered his advances—must less winnings—from the gambler because the law expressly refuses to recognize any rights under his contract.

The respondent Club stands in no better position. It cannot attack the title of Shannon to the money by showing that it belonged to another by virtue of a contract which, by statute law, is null and void. It gave no consideration for the money it received from Shannon (R. 139).

The finding that Shannon was the "agent" in making the payments necessarily involves giving ef-

fect to the contract of bankrolling, which is wholly void under the statute. Even the most convincing documentary evidence of the existence of the contract cannot overcome its invalidity. The daily withdrawal of $40 that Shannon made from the bankroll throughout the season for his personal use—which the respondents claim was "salary"—could have no effect upon the illegality of the contract. Shannon could not have defended a prosecution for gambling upon the plea that he was betting as an "agent."

Aside from the void contract in question, there is no other evidence of agency; quite the contrary.

McClanahan's testimony (R. 227):

> "Q. You have never been a bookmaker in New York State, have you? A. No, I have not."

and Shannon's testimony (R. 168):

> "My name was on the slate that I held up."

stand uncontradicted.

The statement by the Court (R. 254):

> "The claim of illegality should not be permitted as the cloak for injustice."

which seems to have been the motivating factor in the decision is without basis in law. No "injustice" could result to McClanahan—he got his $30,000 back; the respondent Club gave no consideration for Shannon's payments; it would be illegal to give Shannon's own winnings to McClanahan under his financing contract—and in preference to Shannon's creditors.

Throughout his opinion the Trial Court does not support his failure to enforce § 993 of the Penal Law with any authorities or reasoning. He just ignored that controlling law of the land and rendered his decision in spite of it.

It clearly results that the state courts have illegally discriminated against the petitioner and in favor of the respondents by failing to enforce the positive injunction of § 993 of the Penal Law when a racing club is involved, although it is primarily responsible for the gambling conditions at its track and clearly benefited therefrom.

The State Courts have thus ignored a basic principle of general law that has been specifically confirmed by statute, whereby the petitioner has been denied the protection of the law and the writ should therefore be granted.

Armour & Company v. *Fort Morgan S. S. Co.*, 270 U. S. 253, 257.

Respectfully submitted,

HORACE M. GRAY,
Attorney for Petitioner.

HORACE M. GRAY,
CHARLES E. WYTHE,
of Counsel.

CORPORATE PRESS, INC., NEW YORK CITY

APPENDIX A.

JAMES J. MARETT, as Receiver of the Property of PHILIP C. P. TOALE, *Plaintiff*, v. FRANK SHANNON, *Defendant*.

164 Misc. 790.

HUMPHREY, J. This action is brought by a receiver in supplementary proceedings to recover for losses alleged to have been suffered by Philip C. P. Toale to the defendant Shannon for lost wagers. The action was tried without a jury and commenced on September 29, 1936.

A review of the facts antedating the commencement of the action is essential to an understanding of the issues involved. Philip Toale was in the employ of one Max Hirsch, whose business, among other things, was connected with the race tracks operated throughout the State. Philip Toale forged the name of his employer to certain of the employer's checks, which came into the hands of the employee. Contrary to Toale's duty, he deposited these forged checks to his account in the National City Bank.

Subsequently, the National City Bank was compelled to pay Max Hirsch, the employer, the amount of these forgeries.

Toale pleaded guilty to the theft and was sentenced to Sing Sing Prison therefor.

The bank assigned its claim against Toale to one Charles F. Goodspeed, who commenced suit for the amount of the forgeries the bank had been required to pay. Goodspeed, in his action, examined Toale in pro-

ceedings supplementary to execution, and on his motion a receiver was appointed of the property of Toale.

The receiver alleges that Toale lost the moneys in wagers to the defendant Shannon. These transactions happened in 1930. At that time the defendant Shannon was known as a "club house commissioner."

The evidence at the trial would indicate that at that time the system of taking bets was more complicated than it had been at other times, and that only those venturers who had credit with the club house commissioners were permitted to indulge in this sport of kings. Employees of the betting commissioner kept a record of wagers laid and at the close of the day a balance was struck and a check drawn either in favor of the bettor or the club house commissioner.

From the account of the judgment debtor with the National City Bank, into which the forged checks belonging to Max Hirsch had been deposited, the judgment debtor drew checks to the order of the defendant aggregating the sum of $16,560.

It seems plain to me, after hearing all of the testimony adduced at the trial, that these checks represented losses by the judgment debtor to this club house commissioner on the daily balances of wager transactions between the judgment debtor and the defendant.

Section 994 of the Penal Law provides that where money is lost through a wager the amount thereof may be recovered from the winner.

Section 991 of the Penal Law provides: "All wagers, bets or stakes, made to depend upon any race, or upon any gaming by lot or chance, or upon any lot,

chance, casualty, or unknown or contingent event whatever, shall be unlawful."

It has been held that an obligation of that character is assignable. (*Meech* v. *Stoner,* 19 N. Y. 26.) The case of *Watts* v. *Malatesta* (262 N. Y. 80), holds that the whole amount of losses may be recovered without any right on the part of the betting commissioner to offset gains by the bettor. In this case only the balances are sought.

The defendant's contention that these checks represented sums advanced to the judgment debtor in cash fails to make a strong appeal.

Plaintiff, as receiver, may have judgment against the defendant for the sum of $16,560, with interest on the face amount of each check from the date thereof.

APPENDIX B.

CHESTER F. CHAPIN v. JAMES M. AUSTIN.
165 Misc. 414.

HOOLEY, J. The first defense is that the paper sued upon was intended to be a receipt and that it was not intended that defendant be personally liable thereon. The second defense is that the note was made as a part of an illegal transaction, i. e., the financing of a bookmaking business. The court finds that the transaction between the parties was as testified to by the plaintiff and not as testified to by the defendant and his witnesses. There was no partnership between plaintiff and defendant. Defendant borrowed the money and gave his promissory note therefor. The first defense, therefore, fails. The only question remaining is whether a plaintiff who has knowledge that defendant intends to finance a bookmaker may recover money loaned for that purpose. Every consideration of fair dealing demands that this plaintiff should recover upon the note in question. The real wrongdoer was the defendant. He is the one who entered into the bookmaking business. He used his illegal transaction to protect him when called upon to pay the money he borrowed. The court would not aid him in this attempt were it not for the provisions of section 993 of the Penal Law. This section provides in part as follows:

"§ 993. Securities for money lost at gaming void. All things in action, judgments, mortgages, conveyances, and every other security whatsoever, given or executed, by any person, where the whole or any part of the consideration of the same shall be for any money or other valuable thing won by playing at any game whatsoever, or won by betting on the hands or sides of such as do play at any game, *or where the same shall*

be made for the repaying any money knowingly lent or advanced for the purpose of such gaming or betting aforesaid, or lent or advanced at the time and place of such play, to any person so gaming or betting aforesaid, or to any person who, during such play, shall play or bet, shall be utterly void, except where such securities, conveyances or mortgages shall affect any real estate, when the same shall be void as to the grantee therein, so far only as hereinbefore declared." (Italics mine.)

The Constitution of the State of New York prohibits gambling (Art. 1, § 9). The fact that the Legislature has seen fit in the case of the making, registering or recording bets or wagers (better known as bookmaking) at the racetrack, to make the only penalty therefor the forfeiture of the money wagered, to be recovered in a civil action (Penal Law, § 986; Uncons. Laws, § 1141), does not make such bookmaking legal. If section 1141 were construed to make bookmaking at the racetrack legal, it would be unconstitutional. Hence, bookmaking at the racetrack is gaming or gambling, and is illegal. Clearly, then, the loaning of the money herein to defendant with the knowledge that it was to be used to finance a bookmaker was the loaning of money with the knowledge that it was to be used for gaming or gambling, and the transaction is within the purview of section 993 of the Penal Law aforesaid. Likewise, pursuant to that section, the note is void.

The plaintiff relies to some extent upon sections 525 and 602 of the Restatement of the Law of Contracts. The difficulty with this contention is that under the New York Annotations to the aforesaid Law of Contracts it states, pertaining to section 525, as follows: "*No decision involving the qualification in the*

last clause of subsection (1) (the pertinent part herein) has been found. The language of Penal Law, section 993, is very broad, and may not admit of this qualification."

The difficulty with section 602 is that it expressly contemplates that a statute may prohibit recovery because it recites "or unless a statute prohibits recovery." Section 993 of the Penal Law is the statute that prohibits recovery in this case.

The claim of the plaintiff that delivery of the note was complete at the time of the loan transaction and that, therefore, parol testimony may not be introduced to vary, contradict or modify the terms thereof, would be good were it not for the illegality herein involved. The cases cited by plaintiff are sound law but in none of those cases is there any question of illegal consideration. The parol evidence is admissible either to establish or disprove the validity of an agreement which is attacked on the ground of illegality of subject-matter or consideration. (See Richardson on Evidence [4th ed.], §§ 426 and 429, and cases cited.)

It follows from the foregoing that the testimony with respect to the entire transaction was admissible. It follows further that the note herein was a security within the contemplation of section 993 of the Penal Law, and that the same was void and that there can be no recovery thereon.

The defendant's motion for judgment dismissing the complaint is granted. All other motions denied. Thirty days' stay and sixty days to make a case.

(2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 356

JAMES W. ANDREWS, as Trustee in Bankruptcy of the Estate of Frank Shannon, Bankrupt,

Petitioner,

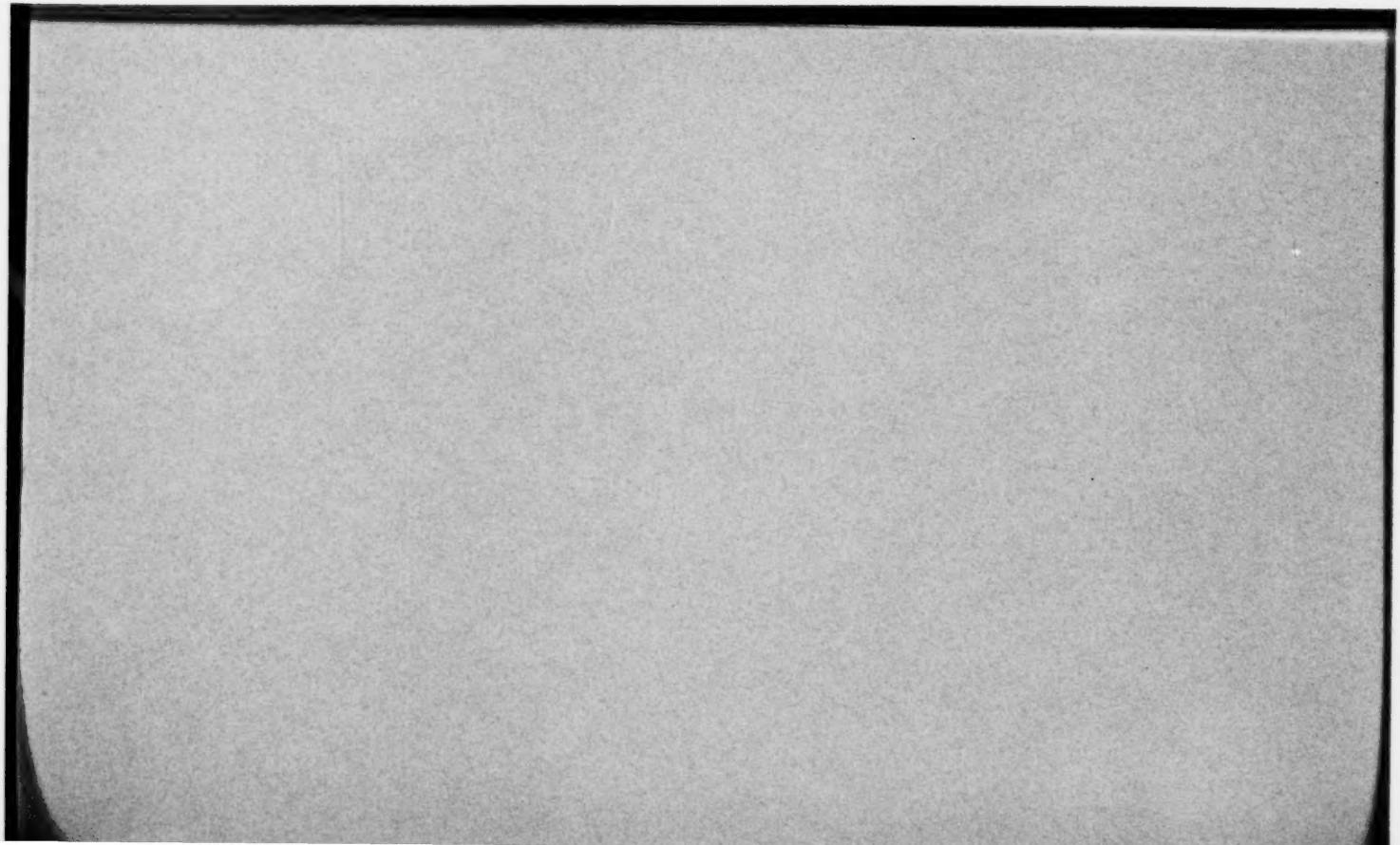
against

THE METROPOLITAN JOCKEY CLUB and WALTER KEENAN and CENTRAL HANOVER BANK AND TRUST COMPANY, Sole Executors of the Estate of John G. Cavanagh, deceased,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOSEPH S. AUERBACH,
MARTIN A. SCHENCK,
HAROLD C. McCOLLOM,
Of Counsel for Respondents.



SUBJECT INDEX

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The petition is for a writ of certiorari. The New York Court of Appeals unanimously affirmed, without opinion, a judgment of the Appellate Division of the Second Department which, in turn unanimously affirmed, without opinion, a judgment of the Supreme Court dismissing plaintiff's complaint after a trial.

Statement

Plaintiff, as Trustee in Bankruptcy of Frank Shannon, sued for money had and received, alleging that between the 1st of April, 1932 and the 1st of December, 1936, in the State of New York, the defendants became indebted to Frank Shannon in the amount of $13,500 for money had

and received by the defendants to the use of Frank Shannon (p. 7, fol. 21).

The complaint was dismissed after a trial before the Court without a jury, in the Supreme Court of Nassau County, Mr. Justice Hooley writing an opinion which is printed at page 252 of the Court of Appeals record. He held:

> "The proof clearly indicates that the moneys used by Shannon through the years 1934, 1935 and 1936, were not his own moneys but rather were moneys belonging to individuals who 'bank-rolled' him. 'Bank-rolling', in racing circles, appears to be a method whereby a bookmaker is financed by some individual who pays the bookmaker a per diem salary and pays all his expenses." (p. 253, fols. 758, 759)

The Court further stated:

> "These funds were not the property of Shannon. He was merely an agent with respect of these payments. The moneys which are the subject of this suit never at any time belonged to the bankrupt. This bars recovery by the trustee herein." (p. 254, fol. 760)

The plaintiff contended that evidence as to the actual ownership of the moneys was erroneously received because the transactions under which the defendant Jockey Club had received moneys through Shannon involved gambling. He urged in turn that the transactions were illegal because Chapter 233 of the Laws of 1934, and Chapter 696 of the Laws of 1937, amending the Penal Law and regulating betting at race tracks, were unconstitutional and void in that such State statutes did not properly carry out the mandate of the State Constitution in regard to betting (Bill of particulars pages 11, 12). Thus, plaintiff argued, the Penal Law, unamended, applied to the transactions, stamped them with illegality, and allowed the creditors of Shannon to recover the moneys on a false presumption that they belonged to Shannon, at the same time precluding defendants from proving that actually, they did not belong to Shannon.

The trial Court refused to allow this argument to preclude proof of the ownership of the moneys, and thus found it unnecessary to decide the so-called "constitutional" question as to whether a State statute properly applied the State Constitution, saying:

> "It would be a miscarriage of justice to allow creditors of a bankrupt to recover money never owned by that bankrupt through a technical claim that evidence may not be presented to show that he did not own the money because he used it in connection with an illegal business, viz.: bookmaking. The claim of illegality should not be permitted as a cloak for injustice." (p. 254, fols. 761, 762)

The Court concluded:

> "The finding by the court that the moneys in question did not belong to Shannon at the time of the payments to the defendant make it unnecessary to pass upon the very interesting questions, constitutional and otherwise, involved herein." (p. 255, fols. 763, 764)

The Appellate Division unanimously affirmed the dismissal of the complaint. The Court of Appeals, after granting permission to appeal to it, has also unanmiously affirmed the dismissal.

Summary of Argument

1. The complaint was dismissed on a purely factual determination that the moneys sought to be recovered by the Trustee in Bankruptcy were not assets of the bankrupt estate. No Federal question was involved in such determination, and no Federal question has heretofore been suggested.

2. This Court has no jurisdiction over the suggested national policy in respect of gambling, and no such question is presented on the record.

POINT I

The petition should be denied, because no Federal question was involved in the dismissal of the complaint, or in the decision below. The factual determination is sufficient to sustain the dismissal.

There is no assertion or claim made in the petition that there has been drawn in question in this case the validity of a statute of the State of New York on the ground of its being repugnant to the Federal Constitution or to the Laws of the United States, nor is there any contention or claim made that any right, title, privilege or immunity was specially set up or claimed by either party under the United States Constitution or under any Statute of the United States.

The determination of the factual dispute as to the true ownership of the moneys involved no Federal question. In respect of the admissibility of evidence on the subject, purely State rules, statutes and decisions were urged. Such questions of evidence present no Federal question.

> *West* v. *Louisiana,* 194 U. S. 258;
> *Bell Telephone Company of Pennsylvania* v. *Pennsylvania Public Utility Commission,* 309 U. S. 30.

The attempt of plaintiff to inject a State constitutional question into the argument in respect of admissibility of evidence did not, in the faintest degree, involve Federal statute or constitution or impairment of plaintiff's rights thereunder. The State statute regulating betting, attempted to be attacked by the trustee in bankruptcy, was of the same character as the Percy-Gray Law (Laws of 1895, Chapter 570), the constitutionality of which had been upheld in *People ex rel. Sturgis* v. *Fallon,* 152 N. Y. 1. The plaintiff,

trustee in bankruptcy, was not affected by the statute, and was in no position to question its constitutionality.

People v. *Sanger*, 222 N. Y. 192;
Liberty Warehouse Co. v. *Burley Tobacco Growers', etc.*, 276 U. S. 71.

The trial Court's decision that its findings as to ownership of the money made it unnecessary to pass upon such question is not, after affirmance by the highest Court, reviewable here.

No Federal question has been pleaded in complaint or bill of particulars. None was raised on the trial or argued in the Court of Appeals. In fact, on plaintiff's application to the Court of Appeals for a reargument, he stated at page 9 that the absence of an opinion by the Court of Appeals rendered it difficult, "if not almost impossible" to comply with the rules of this Court in petitioning for a writ of certiorari, and stated:

> "The Appellant here has been denied a proper record on which to petition the United States Supreme Court for a writ of certiorari in this case."

When petitioner at page 2 of his petition herein states, "The facts are not in dispute", he seemingly concedes that the moneys, in reality, never were assets of his bankrupt's estate.

The finding of fact, determinative of the case, is binding on this Court and is not reviewable here.

Interstate Amusement Co. v. *Albert*, 239 U. S. 560;
Water-Pierce Oil Co. v. *Texas*, 212 U. S. 86;
Chrisman v. *Miller*, 197 U. S. 313.

POINT II

The petition should be denied, because this Court has no jurisdiction over the matters urged therein.

The petitioner suggests as a guiding principle that the gambling industry should bear the economic burden of absorbing the losses incident to its operations, and that this is a matter of wide governmental interest; that it is important that there be a national policy in respect to it; and in respect of such suggested national policy that this is a Court of final jurisdiction. The petitioner does not, in his assignments of error at page 12 of his petition, assert any error involving a Federal question or any question which may properly be reviewed by this Court. The matters of national policy urged by him were not involved in the dismissal of his complaint.

Respectfully submitted,

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Of Counsel for Respondents.